IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PENNSYLVANIA GEAR CORP.	:	
	:	Civil Action
v.	:	98-1538
	:	
JOHN A.. FULTON, a/k/a JACK A. FULTON d/b/a J. FULTON & ASSOCIATES, and J. FULTON & ASSOCIATES, INC.	:	

MEMORANDUM

Broderick, J. January 26 , 1999

Plaintiff Pennsylvania Gear Corporation ("PennGear"), a Pennsylvania corporation whose principal place of business is Pennsylvania, brings this diversity action against John A. Fulton, an Illinois resident, and J. Fulton & Associates, an Illinois corporation whose principal place of business is Illinois, alleging negligence, breach of fiduciary duty, tortious interference with contractual relations, and breach of contract.

Presently before the Court is a motion brought by Defendants to dismiss Plaintiff's complaint for lack of personal jurisdiction pursuant to Fed. R. Civ. P. 12(b)(2) and improper venue pursuant to Fed. R. Civ. P. 12(b)(3), or to dismiss Counts I, II, III, and IV of Plaintiff's complaint for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6). Plaintiff has opposed the motion. For the reasons which follow, this Court will deny Defendants' motion to dismiss for improper venue, and instead transfer the case to the Central District of Illinois, where all Defendants reside. Given the disposition of the venue issue, the Court will not address Defendants' remaining arguments to dismiss Plaintiff's complaint for lack of personal jurisdiction

pursuant to Fed. R. Civ. P. 12(b)(2) or to dismiss Counts I, II, III, and IV of Plaintiff's complaint for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6).

Plaintiff PennGear manufactures gears to the specification of customers, most of whom, such as Caterpillar, Inc. ("Caterpillar") and Komatsu Mining Systems Inc. ("Komatsu"), are engaged in the manufacture of heavy machinery or equipment. Defendant John A. Fulton is President of Defendant J. Fulton and Associates, Inc., a company located in Peoria, Illinois. On or about June 1, 1995, and effective as of that date, Plaintiff PennGear and Defendants entered into a written agreement by which Plaintiff appointed Defendants as Plaintiff's manufacturing representative for the purpose of attracting, servicing and retaining manufacturing business for Plaintiff. ("The Agreement"). Defendants' sole compensation under the agreement was based on commissions generated by sales to designated customers. The Agreement lists the designated customers for which Defendants would receive sales commissions. Most of the designated customers, such as Caterpillar and Komatsu, were located in Illinois, although at least one was located in Indiana.

In a letter dated May 19, 1997, Plaintiff PennGear terminated the Agreement, effective July 21, 1997. Plaintiff alleges that for some period prior to the termination letter, and continuing up to the termination date of the Agreement, Defendants failed to use their best efforts in obtaining orders for Plaintiff PennGear and interfered with the

relationship between PennGear and the designated customers. All of Plaintiff's claims are premised on the following alleged acts or omissions: (a) divulging Plaintiff's otherwise confidential and proprietary information, including pricing information, to competitors of Plaintiff; (b) divulging Plaintiff's otherwise confidential and proprietary information, including pricing information, to Plaintiff's competitors in an effort to have said competitors undercut Plaintiff's prices so as to cause Plaintiff to lose business to said competitors; (c) preventing and otherwise interfering with attempts by Plaintiff's officers, directors and/or representatives to meet with customers, for purposes of making presentations in connection with proposed new business; (d) recommending to Plaintiff's customers that said customers place manufacturing orders with Plaintiff's competitors, rather than Plaintiff; (e) failing and/or refusing to carry out Plaintiff's directions and/or instructions regarding communications with Plaintiff's customers regarding the reasons for various manufacturing delays; (f) failing and/or refusing to use best efforts on behalf of Plaintiff in attracting, servicing, and/or retaining business for Plaintiff; (g) otherwise acting in a manner contrary to their duties as Plaintiff's agent in attracting, servicing, and/or retaining business for Plaintiff. See Complaint ¶ 15 at p. 3.

Normally, "[w]here a court is asked to rule on a combination of Rule 12 defenses, it should pass on the jurisdictional issues first." Friedman v. Israel Labour Party, 957 F. Supp. 701, 706 (E.D. Pa. 1997) (citing 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1351 (1987)). However, a court may reverse the normal

order of considering personal jurisdiction and venue when it is prudential to do so. Leroy v. Great Western United Corp., 443 U.S. 173, 180 (1979); see also 15 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 3826 (1987). Because the resolution of the venue issue makes it unnecessary to address the other issues raised by the Defendants, the Court will address venue first. See e.g. Leech v. First Commodity Corp. of Boston, 553 F. Supp. 688 (W.D. Pa. 1982).

Plaintiff contends that venue is proper under 28 U.S.C. § 1391(a)(2), asserting that the Eastern District of Pennsylvania is "a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred." As the Third Circuit has pointed out, events or omissions must be more than tangentially connected to the claim to qualify as substantial under § 1391(a)(2). See Cottman Transmission Sys., Inc., v. Martino, 36 F.3d 291 (3d Cir. 1994). "Substantiality is intended to preserve the element of fairness so that a defendant is not haled into a remote district having no real relationship to the dispute." Id. at 294. Rather than looking at a defendant's "contacts" with a particular district, the test for determining venue is the location of those "events or omissions giving rise to the claim." Id. To determine whether an act or omission giving rise to the claims is substantial, the court must look at the nature of the dispute. Id. at 295.

The underlying claims in this action are negligence, breach of fiduciary duty, tortious interference with contractual relationship, and breach of contract. The acts and omissions which Plaintiff alleges give rise to all claims consist of Defendants having

allegedly: divulged pricing information to Plaintiff's competitors; interfered with attempts by Plaintiff's officers, directors or representatives to meet with designated customers by causing the customers to cancel presentations and/or by discouraging such customers from entertaining presentations; recommended that Plaintiff's customers place orders with Plaintiff's competitors; failed to communicate to Plaintiff's customers the reasons for various manufacturing delays; and failed to use their best efforts in behalf of Plaintiff in attracting servicing and/or retaining business for Plaintiff. In sum, all of the alleged acts or omissions involve Defendants' allegedly improper statements and acts with customers or competitors in Illinois and Indiana.

None of these alleged acts or omissions, much less a "substantial part of the events or omissions" giving rise to the claims occurred in the Eastern District of Pennsylvania. Plaintiff does not dispute that the Defendants called upon designated customers at their places of business in Illinois and Indiana, and that all of the buyers to whom Defendants sold products are located in Illinois and Indiana. Plaintiff's own affidavit concedes "PennGear's customers that were serviced by Defendants were located in Illinois and Indiana." Affidavit of George Tomlinson, ¶ 5. Plaintiff contends "the instant action is based upon Defendants' *failure to use their best efforts for PennGear* and for *interfering with the relationship between PennGear and its customers* regarding the placement of these orders -- orders that were or should have been transmitted to PennGear's Pennsylvania headquarters." Plff's memorandum in opposition at p. 4-5 (Document # 4) (emphasis added). Thus Plaintiff's own argument acknowledges that Defendants' alleged

acts and omissions actually occurred in Illinois and Indiana, not in Pennsylvania. Even though the result was Plaintiff's non-receipt of orders in Pennsylvania, the acts and omissions bringing about this result occurred in Illinois and Indiana. See Cottman, 36 F.3d at 295.

As the Third Circuit has noted, "the current statutory language still favors the defendant in a venue dispute by requiring that the events or omissions supporting a claim be 'substantial.'" Id. at 294. Plaintiff has not identified substantial activities in Pennsylvania "giving rise to the claim." Plaintiff places great weight in having invoiced sales from customers and collected payments from customers at PennGear's offices in the Eastern District of Pennsylvania. These administrative tasks are not "events or omissions giving rise" to the claims in this action. Nor does the fact that PennGear's products are manufactured in Eastern District of Pennsylvania make this district the appropriate venue for Plaintiff's claims. As noted above, the alleged acts or omissions giving rise to Plaintiff's negligence, breach of fiduciary duty, tortious interference with contract, and breach of contract claims are Defendants' allegedly improper acts and communications with Plaintiff's customers and competitors in Illinois and Indiana.

Having determined that venue is improper under 28 U.S.C. § 1391(a)(2), the procedural remedy to be applied is found in the provisions of 28 U.S.C. 1406(a), which states: "The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought." This section enables the

court to correct an erroneous venue choice without resorting to the harsh remedy of dismissal. See Goldlawr, Inc. v. Heiman, 369 U.S. 463 (1962); 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1352 (1987). Under this provision, a court may transfer a case even without a finding of personal jurisdiction over the defendants. 369 U.S. at 466. The decision as to whether a dismissal or a transfer is appropriate is one committed to the discretion of the court acting in the interests of justice. See 15 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 3826 (1987).

Granting Defendants' motion to dismiss is clearly not in the interests of justice. Such a decision would result in needless expense and delay by requiring a new filing in another district, and might adversely impact Plaintiff if the applicable statute of limitations has run. Defendants have conceded that venue would be proper in the Central District of Illinois because all Defendants reside there. See 28 U.S.C. § 1391(a)(1). The parties have acknowledged that they are already litigating an action based on the same Agreement in state court in Illinois; the Illinois state action was filed prior to this case being filed. This Court has already determined that a substantial part of the acts and omissions giving rise to Plaintiff's claims took place in Illinois or Indiana. Accordingly, the Court finds that the interest of justice is best served by the transfer of this action pursuant to 28 U.S.C. § 1406(a), to the United States District Court for the Central District of Illinois.

In light of this Court's disposition of the venue issue, the Court will not address

Defendants' arguments to dismiss Plaintiff's complaint for lack of personal jurisdiction pursuant to Fed. R. Civ. P. 12(b)(2) or to dismiss Counts I, II, III, and IV of Plaintiff's complaint for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6). The Defendants' motion to dismiss will be denied, and the case will be transferred to the United States District Court for the Central District of Illinois.

An appropriate Order follows.

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O R D E R

AND NOW, this 26th day of January, 1999; upon consideration of Defendants John A. Fulton and J. Fulton & Associates, Inc.'s Motion to Dismiss and Plaintiff's response; the Court having determined that venue is improper under 28 U.S.C. § 1391(a)(2); it being in the interests of justice to transfer the action to the Central District of Illinois, pursuant to 28 U.S.C. § 1406(a); and for the reasons stated in the memorandum dated January 26, 1999;

IT IS ORDERED: Defendants' Motion to Dismiss is DENIED;

IT IS FURTHER ORDERED: This entire action shall be transferred to the United States District Court for the Central District of Illinois, and the Clerk of Court shall take all necessary action to effectuate that transfer.

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RAYMOND J. BRODERICK, J.